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No. 99-1702

IN THE

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

RAYMOND LEVI COBB,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED

1. May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan* v. *Jackson*, 475 U. S. 625 (1986), and *Patterson* v. *Illinois*, 487 U. S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

2. When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine* v. *Moulton*, 474 U. S. 159 (1985), and *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based on the previously charged burglary as a predicate felony?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case raises key issues concerning the police's ability to continue to investigate a suspect's additional criminal conduct after that person is charged with one crime. The Texas

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Court of Criminal Appeals has given a very expansive reading of the confusing term "closely related," improperly allowing the right to counsel to extend to uncharged crimes. It has made this decision without regard to the interrogation's minimal effect on the representation of counsel for the charged crime, with only some simple factual relation to the previously charged crime. This hostility to interrogations needlessly hampers legitimate police investigation, depriving courts and juries of voluntary, highly probative confessions. The Texas court's needless limits on good police work is contrary to the rights of victims and society which CJLF was formed to serve.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Texas Court of Criminal Appeals and the trial judge's findings on the suppression motion. On December 27, 1993, defendant burglarized the residence of Lindsey and Margaret Owings in Walker County, Texas. App. to Pet. for Cert A-3. He stole a stereo system, videocassette recorder, and other things. *Ibid.* Defendant then intentionally killed 22-year-old Margaret Owings and 16-month-old Kori Rae Owings. *Ibid.* He stabbed Margaret in the home and buried her in the woods some two to three hundred yards from the home. *Id.*, at A-9 (McCormick, P. J., dissenting). He also took Kori and buried her alive with her mother. *Id.*, at A-9 to A-10.

Cobb confessed to the burglary in July, 1994. *Id.*, at A-4. The validity of this confession is not challenged. He was indicted for burglary and was appointed counsel. *Ibid.* "Appellant made bond in the burglary case and moved to another town [Odessa]." *Id.*, at A-10 (dissent).

Over a year later, while the burglary case was still pending, Cobb confessed the murder to his father, who then told the police. The Odessa police administered the *Miranda* warnings, as did the magistrate. *Id.*, at D-3 and D-7 (trial court findings 8 and 24). Cobb understood and waived his rights "and

voluntarily took officers to the area where the remains of Margaret Owings and the clothing of Kori Rae Owings were found." *Id.*, at D-3 (finding 8).

Defendant was convicted of intentionally killing two people in a single criminal transaction and was sentenced to death. *Id.*, at A-1. The burglary was originally included in the murder indictment, but that allegation was abandoned before trial. *Id.*, at D-4 (findings 10 and 13). The Texas Court of Criminal Appeals reversed the conviction, holding that the Odessa interrogation violated defendant's Sixth Amendment right to counsel, as the murders were "factually interwoven with the burglary" charge, to which his right to counsel had attached. See *id.*, at A-7 to A-8.

SUMMARY OF ARGUMENT

This case is largely resolved by asking the proper question. The issue in this case is not whether there is an "exception" to the offense specificity of the Sixth Amendment, but rather what is the scope of the rule of exclusion of evidence obtained in violation of the Sixth Amendment.

The basic Sixth Amendment rule, as established in *Massiah* v. *United States*, 377 U. S. 201 (1964) and *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991), is that once a person has been charged and asks for representation, the police may not question that person with regard to the charged offense without the consent of counsel. Questioning related to uncharged offenses, however, is acceptable. This clear rule should not be obscured by the largely unexplained results in *Maine* v. *Moulton*, 474 U. S. 159 (1985) and *Brewer* v. *Williams*, 430 U. S. 387 (1977).

A close reading of *Moulton* dispels any notion that it supports an exception to the Sixth Amendment rule. That decision never mentions any Sixth Amendment exception, but instead consistently ties the right to counsel to the charged offenses. The analysis centered on the state's purpose behind

its post-indictment investigation and whether the investigation constituted impermissible interrogation of the defendant. These points also formed the bulk of the argument in the briefs of both Maine and the United States in *Moulton*. Neither brief argued to separate the uncharged burglary offense from the charged offenses that had been reversed by the Maine Supreme Court. *Moulton*'s unargued, unanalyzed reversal of the uncharged burglary is not precedent for a Sixth Amendment exception.

Nor should *Brewer* v. *Williams* support the exception. As in *Moulton*, the analysis centered on another issue, waiver. Once again, the Court did not discuss any exception to the general rule. The result in this case is best explained by a rule that if material evidence is obtained in violation of *Massiah* with regard to a pending charge, that evidence is not admissible at the trial of the pending charge or of any charges that may be brought later.

This explanation brings these decisions in line with Sixth Amendment precedent. This Court has consistently tied the Sixth Amendment right counsel to charged crimes. The initiation of judicial proceedings is no mere formalism, but instead essential to the proper application of the right. Since the "closely related" exception has sown confusion in the courts, it should be abandoned.

Instead of any "closely related" exception to offense specificity, exclusion should be limited to evidence that is material to guilt of the charged offense. The Sixth Amendment prevents the state from circumventing the right to counsel in the charged offense. If evidence is not material to the charged offense, then the Sixth Amendment is not violated, regardless of how it is obtained. Circumvention is prevented by extending *Massiah*'s exclusionary rule to cover use of material evidence obtained in violation of *Massiah* in the trial of a related offense. Finally, this rule avoids the two evils of unduly hindering investigation and excluding probative evidence discovered in good faith by police who inadvertently step over an ill-defined line.

Because the criminal investigation cannot be neatly segmented, some legitimate investigations will turn up evidence relevant to previously charged offenses. Instead of throwing out valid, highly probative confessions for the slightest taint, the balance of interests warrants a more restrained approach. The materiality standard of *Brady* v. *Maryland*, 373 U. S. 83 (1963) provides the correct middle way. Instead of asking whether the charged and uncharged crimes are "inextricably intertwined," courts should ask whether confidence in the defendant's guilt of the charged offense reasonably would have changed if the statement had not been obtained.

This test would provide a much cleaner path to the same result in most of those cases that have grappled with the "inextricably intertwined exception." The path to the correct result in this case is similarly clear. Since Cobb had all but pled guilty to the charged burglary before his murder confession, his second interrogation did not prejudice his Sixth Amendment right in the burglary.[2]

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2. In our brief supporting the petition for writ of certiorari, we argued that the rule of *Michigan* v. *Jackson*, 475 U. S. 625 (1986) should not apply to invalidate an otherwise valid waiver which follows both a break in custody and actual consultation with counsel. We do not brief that point here because it is not within the questions to which the Court limited its grant of certiorari. We suggest that an express reservation of the point would be in order to preclude any inference that it is decided *sub silento* in this case. Cf. *California* v. *Hodari D.*, 499 U. S. 621, 623, n. 1 (1991) (reserving point); *Illinois* v. *Wardlow*, 528 U. S. __, 145 L. Ed. 2d 570, 120 S. Ct. 673 (2000) (deciding point).

ARGUMENT

I. The question in this case is not whether there is an "exception" to offense specificity of the Sixth Amendment, but rather the scope of the rule of exclusion of evidence obtained in violation of the Sixth Amendment.

Most of the Courts of Appeals and state courts discussing this area speak of an "exception" to the rule of *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991), that the right to have counsel present during questioning after initiation of criminal proceedings is offense specific. A typical characterization can be found in *United States* v. *Hines*, 963 F. 2d 255, 257 (CA9 1992): "An exception to the offense-specific requirement of the Sixth Amendment occurs when the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense."

Although most of these cases arrive at the correct result, *amicus* believes that analyzing the problem in terms of an "exception" to *McNeil* is an undesirable approach. The "exception" approach needlessly clouds the issue and dilutes the constitutional principle of *McNeil*. It contradicts the clear language of this Court's cases, which state the rule without exceptions. A better approach, *amicus* submits, is to ask whether the interrogation has violated the Sixth Amendment with regard to the charged offense and, if so, further ask whether and to what extent that violation requires the exclusion of evidence in the trial of a not-then-charged but related offense.

A. The General Rules: Massiah and McNeil.

The basic rules are well established. "Once a person has been formally charged, . . . , the Sixth Amendment right to counsel attaches, *Massiah* v. *United States*, 377 U. S. 201, 206 . . . (1964), and the police may not question a person so

charged, who is represented or has sought representation, *Michigan* v. *Jackson*, 475 U. S. 625, 632-635 . . . (1986) without the consent of counsel." *Commonwealth* v. *Rainwater*, 681 N. E. 2d 1218, 1221-1222 (Mass. 1997). "The Sixth Amendment right, however, is offense specific. . . . And . . . so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific." *McNeil*, *supra*, 501 U. S., at 175. Where no invalidating rule such as *Jackson* applies, an otherwise valid waiver complying with the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is effective to waive both the Fifth Amendment and Sixth Amendment rights to have counsel present during questioning. See *Patterson* v. *Illinois*, 487 U. S. 285, 293 (1988).

The seeming clarity of the offense specificity principle is obscured by unexplained or only partially explained results in a couple of this Court's cases. From *Maine* v. *Moulton*, 474 U. S. 159 (1985) and *Brewer* v. *Williams*, 430 U. S. 387 (1977), some courts have fashioned an exception to the rule that the Sixth Amendment right to counsel applies only to charged crimes, holding that the right attaches to uncharged crimes that are "inextricably intertwined" with a formally charged offense. See, *e.g.*, App. to Pet. for Cert. A-6 to A-7; *Hines*, *supra*, 963 F. 2d, at 257; *Rainwater*, *supra*, 681 N. E. 2d, at 1223-1224, n. 5 (collecting cases).

Although an exception would explain the results in these cases, it would create inconsistencies. Most statements from this Court concerning the relationship between the Sixth Amendment and uncharged crimes contradict the notion that the right to counsel extends beyond formally charged crimes. Precedent and the rationale of the Sixth Amendment right to counsel argue against turning this unstated inference into a constitutional rule, particularly where there is a better alternative.

B. Maine v. Moulton.

Maine v. *Moulton*, *supra*, is the case usually invoked to support the existence of an "inextricably intertwined exception." This case must be read carefully. A close reading of this decision dispels the inference that it supports the "exception."

The case involved a series of automobile thefts by Moulton and his codefendant Colson from a neighboring car dealership. 474 U. S., at 161-162. On April 7, 1981, Moulton and Colson were indicted on four counts of "theft by receiving." Stolen vehicles and auto parts had been found in a building on the dealership's property rented by the two defendants. *Id.*, at 162. In November of 1982, Colson received threats against him and Moulton. That same month, while Colson and Moulton were discussing the case, Moulton suggested killing a prosecution witness. *Ibid.* Colson then went to the police. In return for not being charged with additional crimes, Colson agreed to testify against Moulton and cooperate with the prosecution. *Id.*, at 163. To deal with the threats against him, Colson also agreed to tape any phone call that contained an anonymous threat or that was from Moulton. *Ibid.* On December 26, 1982, Colson wore a wire transmitter and recorded a meeting with Moulton, in which the two discussed their case. See *id.*, at 164-166.

Once Colson's role as an informant was revealed, the state dismissed the pending indictments and obtained seven new indictments against Moulton. *Id.*, at 167. The new indictment restated the pending charges while adding burglary, arson, and three more counts. *Ibid.* "Moulton pleaded guilty to the charges contained in two of these indictments, and the trial court dismissed two more for improper venue." *Ibid.* He opted for a bench trial on the remaining charges. The state did not offer any of the phone conversations as evidence, but portions of the December 26 meeting were admitted against Moulton. *Ibid.* These portions dealt primarily with discussions concerning "the thefts for which Moulton was originally indicted." *Ibid.* Only one portion of the discussion about false testimony was admitted, while the discussion about killing witnesses was

not admitted. *Ibid.* The trial court dismissed one theft count for improper venue, acquitted Moulton on the arson charge, but convicted him of all other charges. *Ibid.* The Maine Supreme Court reversed the conviction, holding that admitting the body-wire tapes violated Moulton's Sixth Amendment right to counsel. See *State* v. *Moulton*, 481 A. 2d 155, 161 (Me. 1984).

This Court affirmed the Maine Supreme Court's opinion in its entirety. See *Maine* v. *Moulton*, 474 U. S., at 168. Because the Maine Supreme Court vacated a burglary conviction that was not one of the initially charged crimes, some courts have inferred that *Moulton* creates an exception to the rule that the Sixth Amendment only extends to charged crimes. See, *e.g.*, *United States* v. *Melgar*, 139 F. 3d 1005, 1013 (CA4 1998); *United States* v. *Mitcheltree*, 940 F. 2d 1329, 1342-1343 (CA10 1991). Although this inference may be consistent with the disposition in *Moulton*, it contradicts the language of the opinion.

The *Moulton* Court began its analysis with the importance of the Sixth Amendment right to counsel to a fair trial, finding the right "indispensable to the fair administration of our adversarial system of criminal justice." The right to "the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932); *Moulton*, *supra*, 474 U. S., at 169, was not limited to the trial. It extended to " 'critical stages' in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.' " *Moulton*, 474 U. S., at 170 (quoting *United States* v. *Wade*, 388 U. S. 218, 224 (1967)). While this right began before the trial, it still had a definite starting point. The "initiation of adversary criminal proceedings" was the key to unlocking the Sixth Amendment right because this event signaled that the government and the accused were now adversaries. *Ibid.* Because the defendant at that point " ' "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law" ' " the Sixth Amend-

ment right to counsel began. See *ibid.* (quoting *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984), quoting in turn *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972)).

The *Moulton* Court found that the case was an application of *Massiah* v. *United States*, 377 U. S. 201 (1964) and *United States* v. *Henry*, 447 U. S. 264 (1980). Having Colson record the conversations with Moulton and admitting them as evidence thus violated the Sixth Amendment because this practice "obtains incriminating evidence by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Moulton*, *supra*, 474 U. S., at 176.

Much of *Moulton*'s analysis addressed the state's purpose in wiring Colson. The Solicitor General argued that the statements should not be suppressed because the state wired Colson to investigate the threats against the other witness and Colson. *Id.*, at 178. The *Moulton* Court dismissed this argument, noting that *Massiah* recognized the importance of allowing the state to continue investigating after charges are filed, but still forbade the government from using incriminating statements made concerning *charged* crimes. See *id.*, at 178-179.

The balance between the state's legitimate interest in further investigation and the Sixth Amendment right highlights the necessity of the formal charge. The Court understood that the police have an interest in both thoroughly investigating both crimes for which formal charges have already been filed and "new or additional crimes." *Id.*, at 179. More importantly, "law enforcement officials investigating an individual suspected of one crime and formally charged with another crime obviously seek to discover evidence useful at a trial of either crime." *Ibid.* To balance the competing interests, this Court drew a line between charged and uncharged crimes.

> "In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by

> the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the eviscera-tion of the Sixth Amendment right recognized in *Massiah*. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." *Id.*, at 179-180.

Because the Sixth Amendment right attaches at the critical stage of the prosecution, the line must be drawn between formally charged and uncharged crimes. For example, because the pending "charges were the only subject to be discussed at Colson's December 26 meeting with Moulton, a Sixth Amendment violation was inevitable . . . ." *Id.*, at 178, n. 14. On the other hand, "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial for those offenses." *Id.*, at 180, n. 16.

It is difficult to square this language with the reversal of the burglary conviction. Since Moulton was not indicted for burglary until after the December 26 meeting, his Sixth Amendment right to counsel had not yet attached, as there had not yet been any critical stage proceedings for this crime. Cf. *id.*, at 170.

The *Moulton* Court's failure to explain its reversal of both the burglary and the theft charges appears to be due to the way the case was briefed. The arguments of both the state and federal governments were aimed at saving all the convictions. The state's argument was that lack of intent to obtain information on the pending charges negated any Sixth Amendment violation. See Brief for Petitioner in *Maine* v. *Moulton*, No. 84-786, pp. 18-19. The Solicitor General's argument was that the police's purpose of investigating the uncharged offenses removed the case from the ambit of the *Massiah* doctrine and rendered the product of that interrogation fully admissible at a joint trial of both crimes. See Brief for United States as *Amicus Curiae* in *Maine* v. *Moulton*, No. 84-786, part B, last sentence ("*Massiah* did not require the exclusion *at the theft trial* . . ." (emphasis added)). The Court did not discuss whether the burglary conviction could be sustained separately because no one asked it to. Admission of Moulton's statements at his trial for theft was simple *Massiah* error, and the judgment resulting from that trial was reversed. A more finely tuned remedy would have required a more detailed analysis. None was given because none was asked.

While *Moulton*'s holdings on the arguments actually made and addressed are precedent, any unstated implications drawn from the burglary reversal are not. A ruling made in passing, where the underlying issue is not addressed, should not bind this Court. For example, even though this Court applied the harmless-error standard of *Chapman* v. *California*, 386 U. S. 18 (1967) in several of its federal habeas decisions, this fact did not prevent the adoption of a lower harmless-error standard for federal habeas cases in *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993). The Court reasoned "since we have never squarely addressed the issue, and have at most *assumed* the applicability of the *Chapman* standard on habeas, we are free to address the issue on the merits." *Id.*, at 631 (emphasis added).

"Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be

considered as having been so decided as to constitute precedents." *Webster* v. *Fall*, 266 U. S. 507, 511 (1925). The reversal of Moulton's burglary conviction along with the theft might or might not have been a correct result. When a point overlooked in an earlier case is squarely presented for decision, the later court ought not be limited in crafting its rule by any perceived need to be consistent with the earlier result.

Later decisions of this Court describing *Moulton* are consistent with the passage quoted *supra*, at 10-11. In *Moran* v. *Burbine*, 475 U. S. 412 (1986), which was decided the same term as *Moulton*, this Court described the investigation in *Moulton* as "yield[ing] evidence pertaining to two crimes. For one, the defendant had been indicted; for the other he had not." *Id.*, at 431. The Sixth Amendment barred statements concerning the indicted crimes, but not any unindicted crimes. See *ibid.* Similarly, in *Arizona* v. *Roberson*, 486 U. S. 675, 685 (1988), the investigation in *Moulton* was described as one where "the police were seeking information regarding both the crime for which Moulton had already been indicted, and a separate, inchoate scheme."

If there is an exception to the rule that the Sixth Amendment right to counsel does not attach to an offense until the offense reaches a critical stage, it must come from some other source than *Moulton*. That decision did not even indirectly recognize any such exception, and its language contradicts an idea of an exception to the Sixth Amendment rule. The next logical source of support for the "inextricably intertwined exception," this Court's other Sixth Amendment cases, offers no further support for it.

C. Other Cases.

Decisions both before and after *Moulton* reinforce the principle that the Sixth Amendment right to counsel extends only to formally charged crimes. One of the earlier decisions to address the relationship between the Sixth Amendment and uncharged crimes upheld the admission of postindictment

statements obtained by a government informer that "related to the commission of a quite separate offense . . . . " *Hoffa* v. *United States*, 385 U. S. 293, 308 (1966). Any other holding would be "unprecedented and irrational." *Id.*, at 307.

Brewer v. *Williams*, 430 U. S. 387 (1977) is sometimes cited along with *Moulton* as support for the "inextricably intertwined exception." See, *e.g.*, *United States* v. *Arnold*, 106 F. 3d 37, 40 (CA3 1997); *United States* v. *Melgar*, 139 F. 3d 1005, 1013, n. 1 (CA4 1998). *Williams* involved a defendant who had been arrested and arraigned on a child abduction charge. See 430 U. S., at 390-391. This was done in Davenport, Iowa, but Williams was to be driven by the authorities back to Des Moines, Iowa, the scene of the crime. See *id.*, at 391. Defendant had contacted a Des Moines lawyer, who convinced Williams to turn himself in to the Davenport police. The attorney had reached an agreement with the police that Williams was not to be questioned during the trip back from Davenport. *Ibid.* Williams was also twice advised by counsel not to talk to the authorities. See *ibid.* The Des Moines police who drove defendant back from Davenport broke this agreement, getting him to provide the location of the missing girl's body through the "Christian burial speech." See *id.*, at 392-393. Williams was indicted and convicted of first-degree murder. *Id.*, at 393-394. The Iowa Supreme Court affirmed the conviction, holding that defendant had waived his right to counsel during the ride. *Id.*, at 394. Williams successfully sought federal habeas relief in the District Court, which was affirmed on appeal. *Id.*, at 394-395.

Even though Williams had not yet been charged with murder when he effectively confessed, this Court affirmed suppressing the incriminating statements concerning the murder on Sixth Amendment right to counsel grounds. See *id.*, at 400-401. As in *Moulton*, the *Williams* Court reiterated the general rule that the Sixth Amendment right begins when the prosecution reaches a critical stage. *Id.*, at 398. This Court did not explain the relationship of uncharged offenses to the Sixth

Amendment, stating nothing more than that because judicial proceedings had been initiated against Williams, his Sixth Amendment right had attached before the automobile ride. *Id.*, at 399. The state did not contest that point. *Ibid.*

Arnold read this holding as implying an exception to offense specificity, 106 F. 3d, at 40, *i.e.*, that the Sixth Amendment right had attached to the murder as well as the abduction. However, there is another equally plausible mode of analysis that comes to the same result. The product of this interrogation was evidence proving Williams to be guilty of both the abduction and the murder. The interrogation violated Williams' attached Sixth Amendment rights on the abduction charge. The product was therefore illegally obtained evidence. The result in *Williams* is consistent with a rule that if material evidence is obtained in violation of *Massiah* with regard to a pending charge, that evidence is not admissible at the trial of the pending charge or of other charges that may be brought later.

Williams must also be examined in the context of later decisions. *McNeil* v. *Wisconsin*, 501 U. S. 171 (1991) directly confronted the issue of whether the Sixth Amendment right to counsel extended to uncharged crimes. "The Sixth Amendment right, however, is *offense specific*. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, ' "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." ' " *Id.*, at 175 (emphasis added) (quoting *United States* v. *Gouveia*, 467 U. S. 180, 188 (1984), quoting in turn *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion)).

This provides the necessary context to dispel ambiguities about the meaning of *Williams* or *Moulton*. *Gouveia* is also quoted in the portions of *Moulton* and *Williams* that explain the scope of the Sixth Amendment right. See *Williams*, *supra*, 430 U. S., at 398; *Moulton*, *supra*, 474 U. S., at 170. *Moulton* was even quoted by *McNeil* to support the Sixth Amendment's offense-specificity. *McNeil*, *supra*, 501 U. S., at 175-176.

After *McNeil*, cases relying on *Williams* for the proposition that the Sixth Amendment is not offense specific "are no longer vital." *People* v. *Clair*, 2 Cal. 4th 629, 658, 828 P. 2d 705, 722 (Cal. 1992).

Other decisions define the limits of the Sixth Amendment as explicitly as *McNeil*. In *Illinois* v. *Perkins*, 496 U. S. 292, 294 (1990), an undercover agent was allowed to obtain incriminating statements from a prisoner regarding a crime unrelated to the charges for which the prisoner was incarcerated. *Massiah*, *Henry*, and *Moulton* did not apply, because "[i]n the instant case no charges had been filed on the subject of the interrogation and our Sixth Amendment precedents are not applicable." *Id.*, at 299.

Arizona v. *Roberson*, *supra*, contrasted the limits of the Sixth Amendment right to counsel with the broader Fifth Amendment prophylactic of *Edwards* v. *Arizona*, 451 U. S. 477 (1981). Arizona invoked *Moulton* in an attempt to limit the *Edwards* rule to charged offenses. See *Roberson*, 486 U. S., at 684. This Court admitted that in *Moulton* "we recognized, though, that the continuing investigation of uncharged offenses did not violate the defendant's Sixth Amendment right to the assistance of counsel." *Ibid.* The *Edwards* rule, derived from the Fifth Amendment context of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was distinguishable from the very different Sixth Amendment context of *Moulton* and *Massiah*. In contrast to the Fifth Amendment prophylaxis, which "counteract[s] the inherent pressures of custodial interrogation," the Sixth Amendment right "arises from the fact that the suspect has been *formally charged* with a *particular* crime and thus is facing a state apparatus that has been geared to prosecute him." *Roberson*, 486 U. S., at 685 (emphasis added).

Another case that clarifies *Moulton* is *Moran* v. *Burbine*, 475 U. S. 412 (1986). The Court noted, "It is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the

Sixth Amendment right to counsel initially attaches." *Id.*, at 428. Therefore, as *Moulton* and *Williams* recognize, once the Sixth Amendment right to counsel attaches, "the police may not interfere with the efforts of a defendant's attorney to act as a ' "medium" between [the suspect] and the State' during the interrogation." *Ibid.* (quoting *Moulton*, *supra*, 474 U. S., at 176). The defendant's problem was that the "interrogation took place *before* the initiation of 'adversary judicial proceedings.' " *Ibid.* (emphasis in original) (quoting *Gouveia*, *supra*, 467 U. S., at 192). The fact that counsel had been retained for him was thus irrelevant.

Moran's true significance comes from the defendant's unsuccessful attempt to get around this roadblock. He asserted that the Sixth Amendment protects the attorney-client relationship without regard to whether the prosecution has formally started. *Id.*, at 428-429. The "critical stage" cases therefore "concern only the narrow question of when the right *to* counsel—that is to the appointment of counsel—attaches." *Id.*, at 429 (emphasis in original). The right to noninterference, the defense argued, attached when the relationship was formed, or at least when the custodial interrogation began. *Ibid.*

In addition to being impractical, see *id.*, at 430, this argument had serious theoretical shortcomings. "The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Ibid.* Instead, "it becomes applicable only when the government's role shifts from investigation to accusation." *Ibid.*

Moran's analysis of what triggered the Sixth Amendment right to counsel removes any remaining doubts about *Moulton*:

> "Indeed, in *Maine* v. *Moulton*, decided this Term, the Court again confirmed that looking to the initiation of adversary judicial proceedings, far from being mere formalism, *is fundamental to the proper application of the Sixth*

Amendment right to counsel. There, we considered the constitutional implications of a surreptitious investigation that yielded evidence pertaining to two crimes. For one, the defendant had been indicted; for the other, he had not. . . . The Court made clear, however, that the *evidence concerning the crime for which the defendant had not been indicted*—evidence obtained in precisely the same manner from the identical suspect—would be *admissible at a trial limited to those charges*." *Id.*, at 431 (emphasis added).

Moran's interpretation of *Moulton* confirms two points. First, there is a clear break between charged and uncharged offenses. There is no fuzzy exception. Second, admissibility of the evidence depends on the relation between the evidence and the two crimes. If it concerns only the uncharged offense, it is admissible in a trial for that offense regardless of how closely the two offenses may be related in other ways.

D. Confusion Defining "Closely Related."

The focus on the degree of relation between the offenses has produced confusion and inconsistent results. Some courts require only that the cases be "closely related." See, *e.g.*, *Arnold*, *supra*, 106 F. 3d, at 42. Others require that they be "*extremely* closely related." See, *e.g.*, *United States* v. *Cooper*, 949 F. 2d 737, 744 (CA5 1991) (emphasis in original). As this Court has noted in another context, vague terms cannot be made precise merely by piling on adverbs. See *Maynard* v. *Cartwright*, 486 U. S. 356, 363-364 (1988). In deciding whether cases are "closely related" enough to qualify for the perceived exception, courts have come to opposite results on nearly indistinguishable facts. In *Whittlesey* v. *State*, 665 A. 2d 223, 236 (Md. 1995), the Maryland Court of Appeals decided that murder and making false statements about the murder were not close enough, as they involved different acts at different times. Those distinctions were equally present in *Arnold*, which involved solicitation to murder a witness and a prior intimidation of the same witness, yet the court said, "it is difficult to

understand how [the two crimes] could be any more closely related." 106 F. 3d, at 42.

Perhaps recognizing the vagueness of "closely related" as the defining criterion, some "courts have looked for identity of time, place, and conduct." *Whittlesey*, 665 A. 2d, at 235 (collecting cases). Such an approach helps narrow the exception and provides guidance for trial courts, but does not necessarily give the needed guidance to police. At the investigation stage, these elements may not be known. For example, consider a variation on the present case where a house has been burglarized, the residents are missing, and the burglar has been caught. Did the burglar kill the residents at the time and place of the burglary, or did someone else kidnap them the day before, miles away, with the burglar merely taking advantage of the now-vacant house? The police may not know the answer at the time they question the burglar. Finding the answer may be the reason they want to question him.

The path to a better approach is indicated in *United States* v. *Melgar*, 139 F. 3d 1005, 1014-1015 (CA4 1998), holding that factual relation of the crimes is not enough. "A defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses. [Citation.] Courts have not applied the closely related exception in favor of a defendant absent the production of such evidence. [Citations.]" *Id.*, at 1015.

II. Exclusion of evidence should be limited to evidence material to guilt of the charged offense.

The shape of the correct rule is determined by the evil it is meant to prevent and the need to prevent the rule itself from causing new evils. The evil to be prevented is the state's violation of the Sixth Amendment by circumventing the right to counsel on the *charged* offense. See *Maine* v. *Moulton*, 474 U. S. 159, 170-171 (1985). Gathering evidence which is not material to the charged offense, regardless of how it is obtained,

does not violate (or circumvent) any rights regarding *that* offense. Conversely, circumvention is fully prevented by extending the exclusionary rule of *Massiah* to cover use of material evidence obtained in violation of the *Massiah* right in the trial of a related offense. See *Massiah* v. *United States*, 377 U. S. 201, 207 (1964). The new evils to be avoided are (1) undue hindrance of the investigation of additional crimes, and (2) obstruction of the truth-seeking purpose of trials by excluding probative evidence obtained in good faith by police who are found after the fact to have inadvertently stepped over an ill-defined line.

The first filter to apply is to ask whether there has been a violation of the Sixth Amendment with regard to the previously charged offense. Did the police "*knowingly* circumvent[] [defendant's] right to have counsel present at a confrontation between [him] and a police agent . . ."? *Moulton*, *supra*, 474 U. S. at 180 (emphasis added). The key word is "knowingly" rather than "intentionally." On one hand, the presence of an additional motive does not justify an interrogation which the police know will likely produce evidence which is incriminating on the charged offense. *Id.*, at 176, n. 12, 180. On the other hand, police questioning the defendant about another crime have committed no violation if he unexpectedly blurts out a confession to the charged crime. Similarly, an incidental mention of the previous offense, unlikely to produce material evidence in relation to it, is not a violation. See *Commonwealth* v. *Rainwater*, 681 N. E. 2d 1218, 1226 (Mass. 1997). If the questioning produced no evidence relevant to the offense to which the Sixth Amendment right to counsel has attached, the police have done nothing wrong, and there is no basis for excluding any evidence. If the defendant's statement contains severable elements, some of which are relevant to the charged offense and some not, those that are not are admissible in trials for other offenses. That is true regardless of how probative the other statements may be to the charged offense. See *id.*, at 1225; see also *Moulton*, 474 U. S., at 180, n. 16.

Where two offenses are related, it will often happen that compelling evidence of the second offense will have some minor, tangential probative value of guilt of the first offense. In *Rainwater*, for example, because of the defendant's *modus operandi* in a string of thefts, his guilt of one crime had some probative value indicating his guilt of the others. See 681 N. E. 2d, at 1224. Similarly, in *United States* v. *Melgar*, 139 F. 3d 1005, 1015 (CA4 1998), evidence of the defendant's illegal entry into the United States had probative value as motive for his possession of fake identification.

At this point, the rule to be defined must take into account the need to avoid undue hindrance with investigations. As *Moulton* recognized, society has a powerful interest in allowing such investigation to proceed. See 474 U. S., at 180. Crime is not neatly segmented. Inevitably, entirely legitimate investigation of uncharged offenses will turn up evidence relevant to previously charged offenses.

There are two polar positions that might be taken here, and the *Melgar* case illustrates both of them. The District Court believed that the evidence had to be necessary to the prosecution of the charged offense. See *Melgar*, *supra*, 139 F. 3d, at 1015. The Court of Appeals disagreed, noting a long series of Sixth Amendment cases referring only to "incriminating" evidence. *Ibid.* From these cases, the court apparently concluded that mere relevance was enough. *Ibid.*

Amicus submits that neither of the polar extremes explored in *Melgar* is appropriate. Evidence can be less than necessary to the prosecution and still improperly harm defendant's right to counsel for the charged offense. The relevance standard, however, is too low. The purpose of exclusion is to protect the right to counsel in the charged crime from being circumvented, but this protection comes at a high cost. It suppresses the otherwise valid confession to the uncharged crime, an offense for which the Sixth Amendment right has not yet formally attached at the time of the interrogation. Because of their high cost, exclusionary rules should not be extended any further than

is strictly necessary to achieve their purpose. See *United States* v. *Payner*, 447 U. S. 727, 734-735 (1980). The derivative exclusionary rule at issue here must be limited to inculpatory statements which are actually prejudicial, not to those merely relevant, *i.e.*, "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule. Evid. 401.

Seeking a standard to apply, the Court of Appeals in *Melgar* looked to confession cases, both the Sixth Amendment cases of *Massiah* v. *United States*, 377 U. S. 201 (1964) and *United States* v. *Henry*, 447 U. S. 264 (1980), and the Fifth Amendment cases of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Rhode Island* v. *Innis*, 446 U. S. 291 (1980). See *Melgar*, *supra*, 139 F. 3d, at 1015. These cases are inapposite because they involve direct violations of the constitutional right, in *Henry* and *Massiah* by undercover agents eliciting incriminating statements about the indicted crime, and in *Innis* and *Miranda* by an interrogation that violates the self-incrimination privilege. In these cases of direct violations of the defendant's rights in the same case, materiality is only relevant to harmless error analysis. See, *e.g.*, *Arizona* v. *Fulminante*, 499 U. S. 279, 295-296 (1991). It is therefore unnecessary for these cases to distinguish various levels of inculpation. The fact that the "privilege against self-incrimination . . . does not distinguish degrees of self-incrimination," *Miranda*, 384 U. S., at 476, is thus irrelevant to the present case.

The balance of interests involved in extending the exclusionary rule to a different case warrants a more restrained approach to the quantum of evidence. The materiality standard of *Brady* v. *Maryland*, 373 U. S. 83 (1963) and its progeny provides that middle way. In these cases, due process is not violated every time the prosecution fails to disclose evidence favorable to the defendant. Instead, the nondisclosure only "violates due process where the evidence is material to guilt or to punishment . . . . " *Id.*, at 87. This materiality requirement

creates a prejudice standard that the defendant must satisfy for a court to find a due process violation. See *Strickler* v. *Greene*, 527 U. S. 263, 281-282 (1999). Although the *Brady* standard deals with withheld evidence, as opposed to the admitted evidence in the present case, the due process test is easily adapted to a Sixth Amendment context. Instead of asking whether " 'there is a reasonable probability' that the result of the trial would have been different if the [evidence] had been disclosed," *id.*, at 289, courts should instead ask whether confidence in the defendant's guilt of the *charged* offense would be undermined if the statement had not been obtained. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984).

Our proposed rule would also provide clearer guidance to police. They need not guess whether a court at some point in the future will find two offenses "closely related." Existing law already instructs the police that once a "suspect" becomes an "accused" their scope of action is limited. *Michigan* v. *Jackson*, 475 U. S. 625, 632 (1986). At that point, they can no longer knowingly create situations likely to produce statements which are incriminating as to the charged offense in the absence of counsel, see *Maine* v. *Moulton*, *supra*, 474 U. S., at 176, n. 12, without a valid waiver. Our proposed rule merely adds the additional caveat that, in the process of questioning about other offenses, the police should not *knowingly* solicit information *material* to guilt of the charged offense. This structure places the emphasis on materiality of evidence, terrain familiar to detectives, rather than relatedness of offenses, which may turn on facts unknown to the police at the time of questioning. See *supra*, at 19.

This test would provide a cleaner path to the same result in most of the cases that have grappled with the "inextricably intertwined exception." In *United States* v. *Cooper*, 949 F. 2d 737, 743 (CA5 1991), the statements relevant to the previously charged offense were never admitted in evidence. Under our proposed test, the analysis can stop there. If the statements arguably obtained in violation of the Sixth Amendment are

suppressed, defendant has received the remedy to which he is entitled. Statements relevant only to the subsequently charged offense present no Sixth Amendment issue. See *Hoffa* v. *United States*, 385 U. S. 293, 307-308 (1966). In *United States* v. *Kidd*, 12 F. 3d 30, 32-33 (CA4 1993), the tape recorded transaction with an informant produced no evidence relevant to the pending charges at all. There simply is no Sixth Amendment problem here.

In *Rainwater*, which comes closest to the present case, the defendant "had been caught red-handed . . . and pleaded guilty to [the charged] offense." 681 N. E. 2d, at 1225. The "brief and insignificant" statement about the charged offense, see *id.*, at 1226, had no effect on the level of confidence in his guilt of that offense. Any incidental violation of the Sixth Amendment with regard to that offense is insufficient to justify suppression of evidence in the trial of another offense. *Rainwater*'s invocation of the harmless-error doctrine, see *ibid.*, while correct, is unnecessary. There was no error. Harmless error was similarly unnecessary in *Melgar, supra*, 139 F. 3d, at 1016. Caught red-handed with an obviously fake ID, *ibid.*, the evidence of motive of illegal entry into the United States, see *id.*, at 1015, was entirely unnecessary and added nothing of substance to confidence in his guilt. On the other side of the scale, we find cases such as *In Interest of Pack*, 616 A. 2d 1006, 1011 (Pa. Super. 1992), where Pack's admission to burglary was also powerful evidence of guilt of the charged offense—receiving the stolen property taken in the burglary. This is also consistent with the result in *Brewer* v. *Williams*, 430 U. S. 387 (1977), see *supra*, at 14-15, where the same evidence sealed Williams' guilt of both abduction and murder.

One case that would have, and we submit should have, been decided differently is *United States* v. *Arnold*, 106 F. 3d 37 (CA3 1997). In that case, the court decided that the use of an informant was harmless Sixth Amendment error as to the offense for which the Sixth Amendment right *had* attached, because the other evidence of that offense was overwhelming.

See 106 F. 3d, at 42, n. 2. Yet the court suppressed the evidence and reversed the conviction on the offense for which the Sixth Amendment right had *not* attached. This is a nonsensical result, which could have been avoided by proper analysis of the evidence and its materiality to the two offenses.

In the present case, the Texas Court of Criminal Appeals' analysis is cursory, at best. See App. to Pet. for Cert. A-7 to A-8. More care is in order before setting a murderer back on the street. This case calls for a close examination of whether there was any violation of Cobb's Sixth Amendment rights with regard to the burglary charge, the only charge to which the Sixth Amendment had attached, and, if so, whether that violation warrants exclusion of evidence from his trial for murder.

There was some factual connection between the two crimes. The mother was murdered in the course of the burglary and her baby was buried alive soon after. See *id.*, at A-9 to A-10 (dissent). Mere factual connection, however, is not enough. The confession must prejudice the defendant's right to counsel in his burglary offense. Since the defendant had already validly confessed to the burglary before the burglary indictment or the murder confession, see *id.*, at A-4, his right to counsel on that offense was not harmed by anything he said in his second confession. Cobb had all but pled guilty to the charged crime of burglary. Indeed, a little before the murder confession, the defense and the prosecution had almost concluded a plea agreement. See *id.*, at B-6. Since the authorities already had all the evidence they needed on the burglary charge, the murders must have been the near-exclusive focus of this last interrogation. Without the confession at issue here, our confidence in Cobb's guilt of burglary would not be undermined. Because the murder confession was not material to the defendant's burglary case, Cobb's Sixth Amendment rights were not harmed by this interrogation. Absent any tangible harm, the Sixth Amendment provides no basis for suppression of evidence in the murder trial.

CONCLUSION

The decision of the Texas Court of Criminal Appeals should be reversed.

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